
A BILL FOR AN ACT

RELATING TO EDUCATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the partnership
2 between parents, families, professionals, and students is
3 cornerstone to the success of student achievement. From a
4 student's first day of school until the completion of the
5 student's education, hundreds, possibly thousands, of
6 educational decisions will have been made for or by that
7 student. Until a student reaches the age of eighteen, most of
8 those decisions are made by parents, family members, or
9 guardians in consultation with teachers or education officials.
10 However, when a student reaches the age of eighteen, that adult
11 student is presumed to be capable of making the adult student's
12 own educational decisions and has the confidence to participate
13 fully in meetings to make educational decisions, unless
14 determined to be incapable of making decisions. Students at
15 this transition point, regardless of their capacity, may benefit
16 from continued participation, guidance, and advice from the



1 people on whom they have always relied to make educational
2 decisions.

3 As it relates to the numerous decisions and planning
4 activities related to a student with a disability receiving
5 special education and related services, parents of adult
6 students can only participate in these activities if they are
7 either invited by the student or obtain legal guardianship over
8 the individual. While these options create a vehicle for
9 parental participation, they are not comprehensive enough to
10 meet the diverse needs of the students and families in our
11 State.

12 The legislature further finds that guardianships are
13 expensive, labor intensive, and involve a time consuming process
14 that relinquishes all decision making authority from the student
15 to the guardian. Some students may have the capacity and desire
16 to make other life decisions for themselves, but do not feel
17 confident in making educational decisions and may require
18 continued assistance. There are also other families that
19 philosophically strive to maintain the rights of their adult
20 children, regardless of their capacity, and are able to do so
21 because of the array of alternatives to guardianship in the



1 health care, welfare, housing, and financial systems. In these
2 instances, guardianship would not be an appropriate option.

3 The purpose of this Act is to provide a comprehensive array
4 of options for adult students to ensure their ability to make
5 educational decisions that are consistent with the needs of the
6 student in a manner that is respectful to the values of the
7 student and family by:

- 8 (1) Establishing a power of attorney for special
9 education;
- 10 (2) Establishing the process to appoint a surrogate
11 decision maker for an adult student that lacks
12 capacity; and
- 13 (3) Clarifying the authority of a guardian of an adult
14 student.

15 SECTION 2. Chapter 302A, Hawaii Revised Statutes, is
16 amended by adding a part to be appropriately designated and to
17 read as follows:

18 **"PART . ADULT SPECIAL EDUCATION**

19 **§302A- Advance special education directives.** (a) An
20 adult or emancipated minor may give an individual instruction to
21 assist in the development and implementation of individualized
22 education plans for special education. The instruction may be



1 oral or written. The instruction may be limited to take effect
2 only for the purposes of participating in individualized
3 education plan processes.

4 (b) An adult or emancipated minor may execute a power of
5 attorney for special education, which may authorize the agent to
6 receive notices and to participate in meetings and all other
7 procedures related to the student's educational program. The
8 power remains in effect notwithstanding the student's later
9 incapacity and may include individual instructions. Unless
10 related to the student by blood, marriage, or adoption, an agent
11 may not be an owner, operator, or employee of the educational
12 institution at which the student is receiving special education
13 services. The power shall be in writing, contain the date of
14 its execution, be signed by the student, and be witnessed by one
15 of the following methods:

16 (1) Signed by at least two individuals, each of whom
17 witnessed either the signing of the instrument by the
18 student or the student's acknowledgment of the
19 signature of the instrument; or

20 (2) Acknowledged before a notary public at any place
21 within this State.



1 (c) A witness for a power of attorney for special
2 education shall not be:

3 (1) A teacher;

4 (2) An employee of a teacher or school; or

5 (3) The agent.

6 (d) At least one of the individuals used as a witness for
7 a power of attorney for special education shall be someone who
8 is neither related to the student by blood, marriage, or
9 adoption.

10 (e) Unless otherwise specified in a power of attorney for
11 special education, the authority of an agent becomes effective
12 only upon a determination by the student to extend decision
13 making authority to the agent, and ceases to be effective upon a
14 determination that the student has the capacity to make special
15 education decisions and has discharged the agent from doing so.

16 (f) Unless otherwise specified in a written advance
17 special education directive, a determination that an individual
18 lacks or has recovered capacity, or that another condition
19 exists that affects an individual instruction or the authority
20 of an agent, shall be made by a qualified administrator, such as
21 the student's primary physician, psychologist, psychiatrist or



1 the medical director of the department of health developmental
2 disabilities division.

3 (g) An agent shall make a special education decision in
4 accordance with the student's individual instructions, if any,
5 and other wishes to the extent known to the agent. Otherwise,
6 the agent shall make the decision in accordance with the agent's
7 determination of the student's best interest. In determining
8 the student's best interest, the agent shall consider the
9 student's personal values to the extent known to the agent.

10 (h) A special education decision made by an agent for a
11 student shall be effective without judicial approval.

12 (i) An advance special education directive shall be valid
13 for purposes of this part if it complies with this part, or if
14 it was executed in compliance with the laws of the state where
15 it was executed.

16 **§302A- Revocation of advance special education**

17 **directive.** (a) An individual may revoke the designation of an
18 agent only by a signed writing or by personally informing the
19 supervising teacher.

20 (b) A teacher, agent, guardian, or surrogate who is
21 informed of a revocation shall promptly communicate the fact of
22 the revocation to the supervising teacher and to any educational



1 institution at which the student is receiving special education
2 services.

3 (c) A decree of annulment, divorce, dissolution of
4 marriage, or legal separation revokes a previous designation of
5 a spouse as agent unless otherwise specified in the decree or in
6 a power of attorney for special education.

7 (d) An advance special education directive that conflicts
8 with an earlier advance special education directive revokes the
9 earlier directive to the extent of the conflict.

10 **§302A- Educational decisions; surrogates.** (a) A
11 student may designate or disqualify any individual to act as a
12 surrogate by personally informing the supervising teacher. In
13 the absence of such a designation, or if the designee is not
14 reasonably available, a surrogate may be appointed to make a
15 special education decision for the student.

16 (b) A surrogate may make a special education decision for
17 a student who is an adult or emancipated minor if the student
18 has been determined by the qualified administrator to lack
19 capacity and no agent or guardian has been appointed or the
20 agent or guardian is not reasonably available. Determinants to
21 lack capacity may include the following:



1 (1) The student's inability to understand the nature,
2 extent, and probable consequences of a proposed
3 educational program or option, on a continuing or
4 consistent basis;

5 (2) The student's inability to make a rational evaluation
6 of the benefits or disadvantages of a proposed
7 educational decision or program as compared with the
8 benefits or disadvantages of another proposed
9 educational decision or program, on a continuing or
10 consistent basis; or

11 (3) The student's inability to communicate such
12 understanding in any meaningful way.

13 Upon a determination that a student lacks decisional capacity to
14 provide informed consent the qualified administrator or the
15 qualified administrator's designee shall make reasonable efforts
16 to notify the student of the student's lack of capacity. The
17 qualified administrator, or the qualified administrator's
18 designee, shall designate the parent or parents of the adult
19 student to act as the surrogate (unless the student is married,
20 in which event the student's adult spouse shall be designated as
21 educational representative). If the parent or adult spouse is
22 not available or competent to give informed consent, the



1 administrator shall designate a competent individual from among
2 the following, an adult brother or sister, an adult aunt or
3 uncle, or a grandparent. If no one from the previous categories
4 is willing and able to serve as the adult student's educational
5 representative, then an individual (who is not an employee of
6 the department) shall be designated to serve in this capacity
7 (by the department).

8 (c) If any interested person, the guardian, or qualified
9 administrator believes the student has regained decisional
10 capacity, the qualified administrator shall reexamine the
11 student and determine whether or not the student has regained
12 decisional capacity and shall enter a decision and the basis for
13 such decision into the student's educational record and shall
14 notify the student, the surrogate decision maker, and the person
15 who initiated the redetermination of decisional capacity.

16 (d) A surrogate who has been designated by the student may
17 make educational decisions for the student that the student
18 could make on the student's own behalf.

19 (e) The surrogate who has not been designated by the
20 student shall make educational decisions for the student based
21 on the wishes of the student, or, if the wishes of the student
22 are unknown or unclear, on the student's best interest.



1 (f) A special education decision made by a surrogate for a
2 student is effective without judicial approval.

3 (g) A supervising teacher shall require a surrogate to
4 provide a written declaration under the penalty of false
5 swearing stating facts and circumstances reasonably sufficient
6 to establish the claimed authority.

7 **§302A- Decisions by guardian.** (a) A guardian shall
8 comply with the ward's individual instructions and shall not
9 revoke the ward's pre-incapacity advance special education
10 directive unless expressly authorized by a court.

11 (b) Absent a court order to the contrary, a special
12 education decision of a guardian appointed pursuant to chapter
13 560 takes precedence over that of an agent.

14 (c) A special education decision made by a guardian for
15 the ward is effective without judicial approval.

16 **§302A- Obligations of teacher.** (a) Before implementing
17 a special education decision made for a student, a supervising
18 teacher, if possible, shall promptly communicate to the student
19 the decision made and the identity of the person making the
20 decision.

21 (b) A supervising teacher who knows of the existence of an
22 advance special education directive, a revocation of an advance



1 special education directive, or a designation or
2 disqualification of a surrogate shall promptly record its
3 existence in the student's education record and, if it is in
4 writing, shall request a copy and if one is furnished shall
5 arrange for its maintenance in the education record.

6 (c) A supervising teacher who makes or is informed of a
7 determination that a student lacks or has recovered capacity, or
8 that another condition exists that affects an individual
9 instruction or the authority of an agent, guardian, or
10 surrogate, shall promptly record the determination in the
11 student's educational record and communicate the determination
12 to the student, if possible, and to any person then authorized
13 to make educational decisions for the student.

14 (d) A teacher or institution providing special education
15 and or related services to a student shall:

16 (1) Comply with an individual instruction of the student
17 and with a reasonable interpretation of that
18 instruction made by a person then authorized to make
19 educational decisions for the student; and

20 (2) Comply with a special education decision for the
21 student made by a person then authorized to make
22 educational decisions for the student to the same



1 extent as if the decision had been made by the student
2 while having capacity.

3 (e) A teacher or institution that declines to comply with
4 the special education decision for the student made by a person
5 then authorized to make educational decisions for the student
6 shall:

7 (1) Promptly so inform the student, if possible, and any
8 person then authorized to make educational decisions
9 for the student; and

10 (2) Provide continuing special education and or related
11 services as defined by the individualized education
12 plan to the student until a transfer can be effected.

13 (f) A teacher or institution may not require or prohibit
14 the execution or revocation of an advance special education
15 directive as a condition for providing special education and or
16 related services.

17 **§302A- Educational information.** Unless otherwise
18 specified in an advance special education directive, a person
19 then authorized to make educational decisions for a student has
20 the same rights as the student to request, receive, examine,
21 copy, and consent to the disclosure of the Individualized
22 Education Plan or any other educational records.



1 **§302A- Immunities.** (a) A teacher or institution acting
2 in good faith and in accordance with generally accepted
3 educational standards applicable to the teacher or institution
4 shall not be subject to civil or criminal liability or to
5 discipline for unprofessional conduct for:

6 (1) Complying with a special education decision of a
7 person apparently having authority to make a special
8 education decision for a student, including a decision
9 to withhold or withdraw special education and or
10 related services;

11 (2) Declining to comply with a special education decision
12 of a person based on a belief that the person then
13 lacked authority; or

14 (3) Complying with an advance special education directive
15 and assuming that the directive was valid when made
16 and has not been revoked or terminated.

17 (b) An individual acting as agent, guardian, or surrogate
18 under this part shall not be subject to civil or criminal
19 liability or to discipline for unprofessional conduct for
20 educational decisions made in good faith.

21 **§302A- Effect of copy.** A copy of a written advance
22 special education directive, revocation of an advance special



1 education directive, or designation or disqualification of a
2 surrogate has the same effect as the original.

3 **§302A- Effect of this part.** (a) This part shall not
4 create a presumption concerning the intention of an individual
5 who has not made or who has revoked an advance special education
6 directive.

7 (b) This part shall not authorize or require a teacher or
8 institution to provide special education and or related services
9 contrary to generally accepted educational standards applicable
10 to the teacher or institution.

11 (c) This part shall not affect other statutes of this
12 State governing treatment for mental illness of an individual
13 involuntarily committed to a psychiatric facility.

14 **§302A- Judicial relief.** On petition of a student, the
15 student's agent, guardian, or surrogate, or a teacher or
16 institution involved with the student's education, any court of
17 competent jurisdiction may enjoin or direct a special education
18 decision or order other equitable relief. A proceeding under
19 this section shall be governed by .

20 **§302A- Uniformity of application and construction.** This
21 part shall be applied and construed to effectuate its general



1 purpose to make uniform the law with respect to the subject of
2 this part among states enacting it."

3 SECTION 3. There is appropriated out of the general
4 revenues of the State of Hawaii the sum of \$ or so
5 much thereof as may be necessary for fiscal year 2008-2009 for
6 the development of rules regarding the transfer of rights.

7 The sum appropriated shall be expended by the department of
8 education for the purposes of this Act.

9 SECTION 4. This Act shall take effect on July 1, 2008.

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INTRODUCED BY: Norman Sakuma

Report Title:

DOE; SPED; Transfer of Rights; Appropriation

Description:

Establishes a power of attorney for special education; establishes the process to appoint a surrogate decision maker for an adult student that lacks capacity; and clarifies the authority of a guardian an adult student.

